Supreme Court, U.S.
FEB 10 1971
ROBERT SEAVER, CLERK

In the Supreme Court of the United States

October Term, 1970

No. 945

ROBERT J. MILITANA,

Petitioner,

-vs-

UNIVERSITY OF MIAMI,

Respondent.

REPLY TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

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MIAMI REVIEW — 371-4653 — 377-3121

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Respondent respectfully submits that Petitioner's Motion for Leave to File a Supplemental Petition herein should be denied for the following reasons:

1. *The Supplemental Petition was not timely filed.*

This Court does not have jurisdiction to consider a Petition for Writ of Certiorari that is not filed within the time limit prescribed by 28 *U.S.C.* §2101(c). *Toledo*

Scale Co. v. Computing Scale Co., 261 U.S. 399, 43 S.Ct. 458, 67 L.Ed. 719 (1923); *Rust Land Co. v. Jackson*, 250 U.S. 71, 39 S.Ct. 424, 63 L.Ed. 850 (1919).

This Statute requires that a Petition for Writ of Certiorari be filed within ninety days after the entry of the judgment sought to be reviewed. The judgment sought to be reviewed herein was finally determined on June 10, 1970,[1] and the time limit for filing a Petition for Certiorari in this Court ended November 7, 1970.[2] Militana's Supplemental Petition was filed forty-four days later, on December 21, 1970.

2. *There is no provision for the filing of a Supplemental Petition for a Writ of Certiorari beyond the original time limit set by* 28 U.S.C. §2101(c).

Nothing in the Rules of this Court allows a Supplemental Petition for Writ of Certiorari to be filed beyond the time limit for the filing of an original Petition. In his Motion for Leave to File a Supplemental Petition, Militana relies upon Rule 24 of the Rules of this Court. However, Rule 24 deals only with the Brief in Opposition to a Petition for Writ of Certiorari and with Supplemental Briefs. Section 5 of that Rule specifically provides that "any party may file a supplemental *brief* at any time while a Petition for a Writ of Certiorari is pending . . ." (Emphasis added).

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[1] On this date Militana's Petition for Re-Hearing in the Florida Third District Court of Appeal was denied. (A. 1a).

[2] The original deadline of September 10, 1970, was extended to November 7, 1970, by Mr. Justice Black.

The time limit for filing a Supplemental Brief in Opposition to a Petition for Writ of Certiorari is a matter regulated by the Rules of this Court, and is not a jurisdictional limitation imposed by statute. Therefore, Respondent submits that Petitioner should not be allowed to use a provision in the Rules of this Court for the filing of a Supplemental Brief as the basis for his filing a Supplemental Petition for Writ of Certiorari beyond the jurisdictional time limits for filing established by 28 *U.S.C.* §2101(c).

3. *The Supplemental Petition does not involve matters not available at the time the original Petition was filed.*

Petitioner relies upon the statement in Rule 24(5) that a Supplemental Brief may be filed at any time when a Petition for Writ of Certiorari is pending "calling attention to new cases or legislation or other intervening matter not available at the time *of his last filing.*" (Emphasis added). Petitioner then admits that all of the material contained in his Supplemental Petition was available at the time the original Petition was filed, but states that "the matters considered in his memorandum are so close, in time, to the date of filing as to fall within the ambit of Rule 24 . . . "

Nowhere in the Rules of this Court is it provided that a Petition may be filed beyond the expiration of the limit for filing if the Petition is filed only shortly after the expiration of the time limit. Further, Respondent is not aware of any area of jurisprudence wherein the failure to file a document within the limits of a jurisdictional

time limit is excused merely because the filing takes place within a short time after the expiration of the time for filing. Indeed, the fact that the deadline for filing is jurisdictional deprives this Court of the power to consider the matter when the deadline is not met.

WHEREFORE, Respondent prays that this Court will deny Petitioner's Motion for Leave to File a Supplemental Petition and will refuse to consider the Supplemental Petition for Writ of Certiorari filed herein by Militana.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply to Motion for Leave To File Supplemental Petition for Writ of Certiorari to the Florida District Court of Appeal, Third District was mailed to the opposing counsel of record this ____ day of _____, 1971.

By _____